85-746

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL
CLERK

No. A-105

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

FRANK ALBANO and JACQUELINE ALBANO,

Petitioners,

vs.

CRAIG CORPORATION,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gary P. Hollander
Richard J. Hollander
Howard D. Hollander
HOLLANDER and HOLLANDER
33 North LaSalle St.
Chicago, Illinois 60602
312-346-5570

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the trial court properly determined that the doctrine of collateral estoppel applied in the present cause where the pleadings, evidence, jury instructions and judgment indicate that the Albanos' personal liability for the debts of the defendant corporations was established in the earlier Clarion trial.

TABLE OF CONTENTS

PAGE

Table of Cases..... v.

Statement of the Case..... 1

A. Procedural History of the Present Cause..... 1

B. The Albanos' Ownership, Control and Mismanagement of the Defendant Corporations.... 7

C. The Clarion Litigation..... 11

D. The Waiver Defense Presented By The Albanos at Trial..... 14

Summary of Argument..... 16

Argument..... 18

A. The Trial Court Properly Applied The Doctrine of Collateral Estoppel to Prevent the Albanos from Re-Litigating Issues Determined in the Earlier Clarion Trial..... 19

1. The Standard for Application of the Doctrine of Collateral Estoppel..... 19

2. The Same Issue was Decided Adversely to the Albanos

in the Clarion Case as was Presented in the Present Cause..... 21

B. During the Time the Plaintiff Dealt with the Defendant Corporations It Had No Knowledge of the Albanos Mismanagement of Those Corporations and Thus Could Not Have Waived Any Right Against the Albanos..... 30

Conclusion..... 38

TABLE OF CASES

Buffum v. Chase National Bank of City of New York, 192 F.2d 58 (7th Cir. 1951)..... 31, 32

Continental Can Company, U.S.A. v. Marshall, 603 F.2d 590 (7th Cir. 1979)..... 28, 29

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962)..... 22, 23

Garfinkle, Matter of, 672 F.2d 1340 (11th Cir. 1982)..... 31, 33

Kurek v. Pleasure Driveway, 583 F.2d 378 (7th Cir. 1978).. 20, 21, 27

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645 (1979)..... 20

People v. Godden, 56 Ill.App.3d 408, 371 N.E.2d 1089 (1977)..... 32

Perlman v. First National Bank of Chicago, 15 Ill.App.3d 784, 305 N.E.2d 236 (1978)..... 31

Shearsen Hayden Stone, Inc. v. Leach, 583 F.2d 367 (7th Cir. 1978). 31

Universal Gas Co. v. Central Illinois Public Service Co., 102 F.2d 164 (7th Cir. 1939)..... 32

Wetherill v. University of Chicago,
548 F.Supp 66 (N.D. Ill. 1982)..... 19

Whitley v. Seidel, 676 F.2d 245
(7th Cir. 1982)..... 20

Williams v. Liberty, 461 F.2d
325 (7th Cir. 1972)..... 27

STATEMENT OF THE CASE

A.
PROCEDURAL HISTORY OF THE PRESENT CAUSE

Count I of the plaintiff's two-count Complaint alleges a breach of contract by the defendant, Custom Car Stereo,Inc. (hereinafter refered to as "CCS"), for its failure to pay for goods sold and delivered by plaintiff between February 10, 1981, and June 10, 1981. Count II of the complaint is based on an alter ego theory of liability and names as defendants CCS, Custom Car Stero Distributing of Illinois, Inc. (hereinafter referred to as "Distributors"), Custom Car Stereo of Oak Lawn, Inc. (hereinafter referred to as "Oak Lawn"), Frank Albano and Jacqueline Albano. Count II alleges, inter alia, that the Albanos controlled the corporate

defendants, treated the corporate defendants as a single entity, stripped the assets of the corporate defendants and organized the corporate defendants for the purpose of defrauding their creditors. (R. 1)

On July 14, 1982, a default judgment was entered in favor of the plaintiff and against CCS, Distributors and Oak Lawn in the sum of $77,786.78. (R. 25) Thereafter, the plaintiff presented its Motion For Summary Judgment on Count II of the complaint against Frank Albano and Jacqueline Albano. (R. 67) The basis of the summary judgment motion was that as a result of an earlier judgment the Albanos were estopped from denying personal liability for the debts of the corporate defendants. (R. 67 & 68)

The trial court denied the Motion for Summary Judgment and indicated that, while the defendants were estopped from denying certain matters, a fact question existed based on the Albanos' affirmative defense of waiver. (R. 90)

Pursuant to the plaintiff's subsequent motion, the trial court entered an Order which limited the issues at trial. (R. 113) The court found that:

> The doctrine of collateral estoppel is applicable in this case. Defendants are estopped from relitigating the question of whether or not they operated the corporate entities as their alter ego so as to warrant the piercing of the corporate veil or veils existing between them and the plaintiff. This issue is the same as was decided in the Clarion case. The issue was litigated in that action, and the judgment entered was dependent upon the determination of that issue. It is not open for

redetermination in this case.

(R. 113)

Accordingly, the trial court ordered that the trial would proceed on the sole issue of whether the plaintiff waived its right to proceed against the Albanos. (R. 113)

The trial of this cause commenced on February 6, 1984. At that time the trial judge ruled that he would not instruct the jury as to any wrongdoing on the part of the Albanos because this might cause them prejudice. (Tr. 4) The court also determined that the plaintiff could not put on any evidence of the Albano's wrongdoing unless the Albanos were to first "open the door" for this testimony. (Tr. 4)

During the Albanos' case in chief Mr. Albano testifed over the plaintiff's objection that he established

Distributors for a legitimate purpose. (Tr. 212-217) Mr. Albano further testified that he would have returned the plaintiff's merchandise upon request, that the plaintiff was fully informed of the Clarion case, knew the details of Mr. Albano's management of the corporate defendants, was provided all information regarding the financial condition of the corporate defendants, was fully provided with accurate records by Mr. Albano whenever he was requested to provide this information, and that the Clarion case arose due to a legitimate dispute between the parties. (Tr. 211-212, 220-221, 226, 238) After hearing this testimony the trial judge held that the plaintiff was still barred from presenting any evidence of the Albanos' wrongdoing. (Tr. 293)

On February 8, 1984, the jury

returned a verdict in favor of the plaintiff and against the Albanos. (R.134) In answer to Special Interrogatories the jury returned a verdict that the plaintiff did not waive its right to proceed against the Albanos personally. (R. 131) The trial court entered judgment in favor of the plaintiff and against the Albanos in the sum of $85,141.03. The amount of the judgment included interest from the date judgment was entered against the corporate defendants. (R. 135)

The Albano's motions for a new trial and for judgment notwithstanding the verdict were denied and they then file their Notice of Appeal the the United States Court of Appeals for the Seventh Circuit. (R. 148) On May 13, 1985, the judgment against the Albanos was

affirmed in the Seventh Circuit. (Appendix A)

B.

THE ALBANOS' OWNERSHIP, CONTROL AND MISMANAGEMENT OF THE DEFENDANT CORPORATIONS

From 1976 until May 14, 1981, the defendant, Frank Albano, was the sole shareholder, director and officer of CCS. (Rec. 88, at T.30) CCS was engaged in the business of selling and installing car stereos. (Rec. 88, at T. 27) Prior to the trial of this cause, Mr. Albano testified that the office of CCS was located at 9736 Southwest Highway, Oak Lawn. (Rec. 88, at T. 60-61, 78) At the trial of this cause Mr. Albano testified that the office of CCS was located at 9749 Southwest Highway. (Tr. 210)

On June 30, 1980, Mr. Albano incorporated Distributors. (Rec. 88, at T. 38) Mr. Albano was the sole

incorporator, shareholder and director of Distributors, and was also Distributors' President and Treasurer. (Rec. 88, at T. 31, 38) Mr. Albano's wife, Jacqueline Albano, was the Vice-President and Secretary of Distributors. (Rec. 88, at T. 31) The initial capitalization of Distributors was $1,000. (Rec. 88, at T. 38)

Distributors was engaged in the same business as CCS and purchased from the same suppliers. (Rec. 88, at T. 27) Distributors shared office space with CCS at 9736 Southwest Highway, Oak Lawn. (Rec. 88, at T. 60-61, 78)

On July 8, 1980, Mr. Albano incorporated Oak Lawn. (Rec. 88, at T. 31, 38) Mr. Albano was also a director and officer of Oak Lawn. (Rec. 88, at T. 31, 38) Oak Lawn shared office space

with CCS and Distributors at 9736 Southwest Highway, Oak Lawn. (Rec. 88, at T. 60-61, 78) Oak Lawn took over the selling operations of CCS. (Rec. 88, at T. 31, 48)

In addition to sharing office space, the corporate records and checkbooks of CCS, Distributors and Oak Lawn were kept together. (Rec. 88, at T. 60-61, 78) Distributors paid the rent for CCS and Oak Lawn. (Rec. 88, at T. 61) Distributors also paid a debt of CCS to William H. Caldwell, Sr. for the purchase of stock in CCS, for a van owned by CCS, for a car owned by CCS and/or Frank Albano and for a Lincoln Mark IV automobile owned by CCS. (Rec. 88, at T. 66-77, 80-88) In addition, Distributors gave Christmas bonuses to employees of the other various Custom Car Corporations

who never worked for Distributors. (Rec. 88, at T. 89-91).

In late 1980 or early 1981, Distributors made a $25,000 personal loan to Mr. Albano. The loan was at 2% below prime and was made without Mr. Albano pledging any collateral. The decision on behalf of Distributors to loan the money was made by Mr. Albano. The proceeds of the loan were used to purchase the property upon which the corporations were located. Mr. Albano, after using the $25,000 as the initial down payment on the property, charged rent to Distributors. Mr. Albano could not recall paying interest on the note as it was due every 90 days. The loan was subsequently forgiven and was never repaid by Mr. Albano. (Rec. 88, at T. 92-98)

On May 14, 1981, Mr. Albano sold

his interest in CCS, Distributors and Oak Lawn to third parties. In exchange, Mr. Albano was given $100,000 of the inventory of Distributors, forgiveness of the $25,000 loan from Distributors and a $30,000 promissory note from the purchasers. No consideration was paid to Distributors. (Rec. 88, at T. 124-132)

Mr. Albano then opened Dashboard, Ltd. at the same location where Distributors had been doing business. Dashboard began operating with the same inventory that had previously belonged to Distributors. One of the conditions of the sale of Distributors was that it would move out of the premises. (Rec. 88, at T. 183-186)

C.
THE CLARION LITIGATION

On May 28, 1980, Clarion

Corporation of America filed suit in the United States District Court for the Northern District of Illinois, to recover for monies due from CCS. Count I of Clarion's two-count Amended Complaint alleged breach of contract by CCS. Count II of the Amended Complaint was based on an alter ego theory of liability and named CCS, Distributors, Oak Lawn, Frank Albano and Jacqueline Albano as defendants. Count II alleged, inter alia, that the Albanos controlled the corporate defendants, treated the corporate defendants as a single entity, stripped the assets of the corporate defendants and organized the corporate defendants for the purpose of defrauding their creditors. (Rec. 88, Ex. "1")

The Clarion case was tried to a jury on August 21, 1981, at which time a

verdict was returned in favor of the plaintiff and against CCS, Distributors, Oak Lawn, Frank Albano and Jacqueline Albano in the amount of $46,242.51. The trial court entered judgment on the verdict after stating that:

> I think it was fait accompli before the evidence was in. As I indicated to you, I would have no problem with this case. It would take me about thirty seconds to make oral findings of fact and conclusions of law. The result was correct.

(Rec. 88, at T. 226)

Frank Albano and Jacqueline Albano subsequently appealed from the judgment entered in the District Court. On December 13, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the judgment. In affirming, the Court stated:

The evidence at trial revealed

> a classic example of asset stripping by the Albanos and circumstances which clearly warranted the piercing of the corporate veil.

(Appendix A, p.8)

D.
THE WAIVER DEFENSE PRESENTED BY THE ALBANOS AT TRIAL

Rocco Rotollo, the plaintiff's sales manager, testified that he was aware of the establishment of Distributors during or about July of 1980. (Tr. 105) Mr. Rotollo was told at that time that Distributors was set up for the purpose of easing distribution problems Mr. Albano was having with his corporations. (Tr. 212) Mr. Rotollo was assured that the establishment of Distributors would not affect the relationship between plaintiff and the Albanos. (Tr. 41) Craig then changed their invoices and began dealing with

Distributors.

On May 14, 1981, Mr. Albano sold his shares in the defendant corporations to William Boris and William Caldwell. (Tr. 227) The plaintiff was not informed of the sale until after it had occurred. (Tr. 48, 50, 108, 111) The purchasers of the corporations were former employees. (Tr. 47-48) The plaintiff refused to extend any credit to the defendant corporations after this transfer took place. (Tr. 51-52, 114) Thereafter, the only transactions with the defendant corporations were to credit their accounts pursuant to promotional agreements made prior to the sale and for the return of defective merchandise, thereby reducing the amount of money owed to the plaintiff, and also cash sales of parts needed for repairs. (Tr. 51-52,

73-74, 114) The plaintiff unsucessfully attempted to have the defendant corporations pay the outstanding debt. (Tr. 51)

During the time the Albanos were setting up Distributors and Oak Lawn, they were also involved in litigation with Clarion Corporation of America. (Tr. 264) Mr. Albano claimed to have discussed the Clarion litigation with the plaintiff's representatives. (Tr. 272-273) The Albanos admitted that they never indicated to the plaintiff that they were personally liable for the debts of the defendant corporations or that there was any liability to Clarion. (Tr. 263, 264, 277, 316-317)

SUMMARY OF ARGUMENT

The Clarion litigation involved a count for breach of contract against CCS

and a count based on an alter ego theory of liability naming all corporate defendants and the Albanos. The judgment in Clarion pierced the corporate veil of all the corporate defendants and held the Albanos personally liable for the debts of the corporations.

The trial court in the present cause reviewed the pleadings, evidence and jury instructions from Clarion. The pleadings and jury instructions dealt with piercing the corporate veil of Distributors. Evidence was presented which overwhelmingly established asset stripping and mismanagement of Distributors. Judgment was entered against the Albanos and all the corporate defendants, including Distributors. Based on the foregoing facts the trial court properly held that the Albanos were

estopped from denying personal liability for the debts of Distributors.

ARGUMENT

The Albanos assert that the judgment entered below should be reviewed because the lower courts improperly and unfairly applied the doctrine of collateral estoppel by barring the Albanos from relitigating the issue of their liability for the debts of the corporate defendants. As will be shown, the applicable case law dictated that the trial court apply the collateral estoppel doctrine to bar the Albanos from relitigating the issues determined in Clarion and the Court fairly applied the doctrine by granting every benefit of the doubt to the Albanos in its rulings relating to the conduct of the trial.

A.
THE TRIAL COURT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO PREVENT THE ALBANOS FROM RE-LITIGATING ISSUES DETERMINED IN THE EARLIER CLARION TRIAL

Illinois law on the doctrine of collateral estoppel applies in federal court diversity cases. Wetherill v. University of Chicago, 548 F.Supp. 66,68 (N.D. Ill. 1982). The Illinois requirements for application of collateral estoppel are the same as under federal law. Id.

1. The Standard For Application of the Doctrine of Collateral Estoppel

The doctrine of collateral estoppel applies where the following four-part test is met:

> Whether the issue sought to be concluded is the same as that involved in the prior action; was litigated in the prior action; was in fact judicially determined in the prior action; and whether the judgment in the prior action was dependent upon

the determination.

Whitley v. Seidel, 676 F.2d 245, 248 (7th Cir. 1982), 1B Moore's Federal Practice, Sec. 0.443(1) (1982). Additionally, it is no longer required that "mutuality of estoppel" exist, and the doctrine can be asserted offensively by a new plaintiff against a defendant who was a party in the previous litigation. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 8 L.Ed2d 552 (1979), Whitley v. Seidel, 676 F.2d 245, 248 (7th Cir. 1982).

When determining whether the same issue was determined in the prior proceeding, it is not sufficient to merely look to the appellate court opinion from the prior proceeding. Kurek v. Pleasure Driveway, 583 F.2d 378, 380 (7th Cir. 1978). Rather, the judgment

entered in the prior proceeding must be construed along with the facts elicited in that proceeding to determine whether estoppel applies. Id.

2. The Same Issue Was Decided Adversely To The Albanos In The Clarion Case As Was Presented In The Present Cause.

The Albanos assert, without reference to the Clarion record or judgment, that in the Clarion case the financial condition of Distributors, asset stripping from Distributors and whether to pierce the corporate veil of Distributors was not in issue. Rather, the Albanos would have this Court believe that the evidence presented in the earlier proceeding dealt primarily with asset stripping from CCS.

The facts elicited at the Clarion trial, however, established that the Albanos defrauded their creditors both in

June and July of 1980 when Distributors and Oak Lawn were established and when Distributors was stripped of its assets during its operation and through its sale on May 14, 1981. A review of the facts and judgment entered in the Clarion case, indisputably establishes that the same facts were determined in the earlier proceeding as the plaintiff would have had to prove in the present cause. These facts, which all involve stripping of the assets of Distributors and mismanagement of Distributors, include the following:

> a. That CCS and Distributors were both in the business of selling and installing car stereos, and both businesses purchased from the same suppliers. (Rec. 88, at T. 27)
>
> b. That Frank Albano sold his interest in CCS, Distributors and Oak Lawn on May 14, 1981. (Rec. 88, at T. 29)
>
> c. That Frank Albano was the

sole shareholder, director and officer of CCS. (Rec. 88, at T. 30)

d. That Frank Albano was the sole incorporator, shareholder and director of Distributors, and was also President and Treasurer. Jacqueline Albano was the Vice-President and Secretary of Distributors. The initial capitalization of Distributors was $1,000. (Rec. 88, at T. 31, 38)

e. That on or about July 8, 1980, Frank Albano incorporated Oak Lawn, which took over the operations of CCS at 9732 Southwest Highway, Oak Lawn. Frank Albano was the sole offficer and shareholder. (Rec. 88, at T. 31, 48)

f. That Frank Albano controlled six corporations, all of which were involved in the same type of business. (Rec. 88, at T. 48)

g. That CCS, Distributors and Oak Lawn all shared office space at 9736 Southwest Highway, Oak Lawn, and kept all of their checkbooks and corporate records together at that location. Distributors paid the rent for CCS and Oak Lawn. (Rec. 88, at T. 60-61, 78)

h. That Distributors paid for debts incurred by CCS, such as CCS' agreement to purchase its own stock from William H. Caldwell, Sr. Distributors also paid for a van owned by CCS, for a car owned by CCS and/or Frank Albano and for a Lincoln Mark IV automobile owned by CCS. (Rec. 88, at T. 66-69, 70-77, 80-88)

i. That Distributors gave Christmas bonuses to employees of the other various Custom Car Corporations who never worked for Distributors. (Rec. 88, at T. 89-91)

j. That in late 1980 or early 1981, Distributors made a $25,000 personal loan to Frank Albano. The loan was at 2% below prime and was made without Mr. Albano posting any collateral. The decision on behalf of Distributors to loan the money was made by Frank Albano. The proceeds of the loan were used to purchase the property which the corporations were located upon. Mr. Albano then began to charge Distributors rent. Mr. Albano could not recall paying interest as it became due every 90 days. The loan was subsequently forgiven and was never repaid by Mr. Albano.

(Rec. 88, at T. 92-98)

k. That the Albanos failed to follow corporate formalities while they were controlling the various corporations. (Rec. 88, at 112, 116-118, 121-124)

l. That on May 14, 1981, Frank Albano sold his interest in Distributors to third parties. In exchange, Mr. Albano was given $100,000 of the inventory of Distributors, forgiveness of the $25,000 loan from Distributors, and a $30,000 promissory note from the purchasers. Although the inventory of Distributors was sold, no consideration was paid to Distributors. (Rec. 88, at T. 124-132)

m. That Frank Albano then opened an entity known as Dashboard, Ltd., at the same location where Distributors had been doing business. Dashboard, which was involved in the same type of business, began operating with the same inventory that had previously belonged to Distributors. (Rec. 88, at T. 183-186)

The facts set forth above are precisely the same facts that the plaintiff in the present cause would have

to establish to prevail on its action against the Albanos. These facts clearly establish that throughout 1980 and until May 14, 1981, the Albanos mismanaged and stripped the assets of the corporations they controlled, including Distributors. It was during this same time period that the obligation to the plaintiff in the present cause was incurred. Based on these facts, and the judgment entered in the Clarion case, it is clear that the Albanos personal liability for the debts of Distributors has already been established. To hold otherwise would cause the plaintiff to present the same evidence relating to the precise issue determined in the Clarion case.

The appellate opinion from Clarion is not determinative of whether the same issue was litigated in the Clarion trial.

Kurek v. Pleasure Driveway, 583 F.2d 378, 380 (7th Cir. 1978). Rather, "it is the judgment, properly construed in the light of pertinent facts, that creates the potential for collateral estoppel..." Id. Where, as here, the general verdict does not recite what matters were determined in the earlier suit, it is for the trial judge to ascertain what issues were previously determined by examining the earlier record, including the pleadings, the evidence and the jury instructions. Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972). citing 340 U.S. 568-569.

The pleadings in Clarion place the Albanos' mismangement of Distributors in issue and seek to pierce the corporate veil of Distributors (Rec. 88, Ex. "1") The Facts adduced during the Clarion trial, as set forth above, provide

evidence of asset stripping and mismanagement of Distributors more than sufficient to compel the Clarion jury to pierce the coporate veil of Distributors. Significantly, the jury instructions asked to pierce the corporate veil of all three corporate defendants. (Rec. 88, at "Clarion Brief", p.p. 19-20) Judgment was entered against the three corporate defendants, including Distributors.

The Albanos cannot avoid the collateral estoppel effect of Clarion by claiming that a point which was placed in issue and which supports that judgment was irrelevant to the determination of that case. Continental Can Company, U.S.A. v. Marshall, 603 F.2d 590, 595-596 (7th Cir. 1979). Rather, if the parties disputed an issue which was then resolved by the trier of fact, collateral estoppel

applies. Id.

Additionally, the Albanos claim in this regard is based on the fact that the remaining unpaid invoices were originally addressed to Distributors. The plaintiff, however, originally invoiced CCS. (Tr. 151-155) This procedure was changed in mid-1980 at the request of Mr. Albano. The stated reason for this change was merely to simplify the Albanos' distribution procedures. (Tr. 41) The plaintiff was assured that this change was in form only and would not effect the nature of the relationship between the parties. (Tr. 41) The plaintiff then continued to ship the same products without delay to the same locations. (Tr. 45)

The Albanos now seek, as they did during the Clarion trial, to assert the

separate corporate identities between CCS and Distributors. This is a distinction which the Albanos did not adhere to while they operated the Custom Car corporations and which was conclusively discarded by the Clarion judgment.

Furthermore, the plaintiff in this cause is suing on invoices dated between December 16, 1980, and April 9, 1981. This involves the same time frame as the facts elicited at the Clarion trial. These facts established the Albanos liability for the debts of the corporate defendants and they apply with the same force and effect to establish liability to every creditor of the corporations in existence during this time period, including the plaintiff in this cause.

B.

DURING THE TIME THE PLAINTIFF DEALT

WITH THE DEFENDANT CORPORATIONS IT HAD NO KNOWLEDGE OF THE ALBANOS' MISMANAGEMENT OF THOSE CORPORATIONS AND THUS COULD NOT HAVE WAIVED ANY RIGHT AGAINST THE ALBANOS

Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege which, except for waiver, would have been enjoyed. Shearsen Hayden Stone, Inc. v. Leach, 583 F.2d 367 (7th Cir. 1978), Buffum v. Chase National Bank of City of New York, 192 F.2d 58 (7th Cir. 1951). Perlman v. First National Bank of Chicago, 15 Ill.App.3d 784, 305 N.E.2d 236 (1978). The waiver may be express or implied from conduct. Matter of Garfinkle, 672 F.2d 1340 (11th Cir. 1982), Buffum v. Chase National Bank of City of New York, supra. There can be no waiver unless it plainly appears that the party has acted with full knowledge of

the right which has allegedly been waived. Universal Gas Co. v. Central Illinois Public Service Co., 102 F.2d 164 (7th Cir. 1939). "Courts should indulge every reasonable presumption against waiver... (citation omitted) The intention to relinquish the known right must be 'proven by clear, precise, and unequivocal evidence,' and the burden of proof is upon the party claiming waiver." People v. Godden, 56 Ill.App.3d 408, 371 N.E. 2d 1089, 1093 (1977). Where, as here, "the only proof of an intention to waive rests on what a party does or forebears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible." Buffum v.

Chase National Bank of City of New York, 192 F.2d 58 (7th Cir. 1951). Waiver does not arise from a forebearance to act for a reasonable time. Matter of Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982).

The Albanos' waiver defense was based on the following facts: 1) that the plaintiff knew of the changeover from CCS to Distributors and made no objection to this change; 2) that the plaintiff knew of the subsequent sale of the Distributors stock to third persons and did nothing to prevent the sale; and 3) that the plaintiff attempted to collect the debt it was owed from the corporations which had incurred the debt.

Since the plaintiff was dealing with corporate entities the changeover from CCS to Distributors and the subsequent sale of the Distributors

stock, if legitimate transactions, would not have created personal liability on the Albanos. Frank Albano admitted telling the plaintiff's agents that Distributors was established for a legitimate business purpose, i.e. to act as a central distributor for the Albanos. (Tr. 218) Mr. Albano persists in his claim that Distributors was established for a proper purpose. (Tr. 283) Similarly, if the sale of the Distributors stock was properly conducted, the plaintiff would have no standing to object to the sale and there would not have been the resulting liability on the Albanos.

Nowhere in the record do the Albanos claim to have informed any agent of the plaintiff that the assets of the defendant corporations had been stripped,

that the various corporations had paid each others debts, that the corporate formalities had not been followed or of the various other acts of mismanagement. Without this knowledge, the plaintiff could not have known of any right to collect the outstanding debt personally from the Albanos. Since the plaintiff did not know of any right to proceed against the Albanos, there could not have been a knowing waiver of such right.

Even if the Albanos could establish full knowledge on the part of the plaintiff, an implied waiver would not have existed. The sale of Distributors occurred on May 14, 1981. (Tr. 227) This cause was commenced against the Albanos on September 1, 1981. In the interim, the plaintiff attempted to collect the debt it was owed from the

corporations which had incurred the debt. (Tr. 52-53) This was a reasonable business decision which would have been made by any other party in the same situation.

After the sale of Distributors, the plaintiff refused to do business with the Albanos or their new entity, Dashboard, Ltd. (Tr. 115-116) The plaintiff also refused to extend any further credit to the corporations until the existing indebtedness had been paid. (Tr. 51-52, 114)

The Albanos emphasized the fact at trial that the plaintiff knew of the Clarion litigation. Mr. Albano admitted, however, that the plaintiff was told that there was no wrongdoing in the management of the companies. (Tr. 277) The fact of the Albanos mismanagement of the

corporations did not come to light until the Clarion judgment was entered against the Albanos on August 25, 1981. (Rec. 68, Ex. "1") Within 2 weeks of the Clarion judgment the plaintiff's Complaint was on file. (Rec. 1)

In sum, the Albanos were free to inform the jury of the wrongdoing which led to the corporate veil being pierced and to present any evidence they had which would indicate that the plaintiff knew of their wrongdoing. The Albanos chose not to proceed in this manner. The trial judge prevented the plaintiff from informing the jury of the Albanos' wrongful acts. The jury obviously saw through the Albanos' illusory defense and quickly rejected their waiver theory.

CONCLUSION

For the foregoing reasons Craig Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari heretofore filed by Frank Albano and Jacquline Albano.

Respectfully submitted,

Craig Corporation,

by:_____
one of its attorneys

Gary P. Hollander
Richard J. Hollander
Howard D. Hollander
Hollander and Hollander
33 North LaSalle St.
Chicago, Illinois 60602
312-346-5570